(2)

No. 87-1573

In The

Supreme Court of the United States

October Term, 1987

WILLIE B. KILGORE, DORIS McCONNELL AND PATSY BURCHETT,

Cross-Petitioners,

v.

COMMONWEALTH OF VIRGINIA, *ex rel.* STATE BOARD OF ELECTIONS, KATHERINE JONES McCLELLAND, FAYE OWENS, ROGER ADAMS, EVELYN BACON, PHILLIP CHEEK, the COUNTY OF LEE, VIRGINIA, the COUNTY OF SCOTT, VIRGINIA, the REPUBLIC INSURANCE COMPANY, and the COMPASS INSURANCE COMPANY,

Cross-Respondents.

OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THOMAS J. McCARTHY
GARY C. HANCOCK
(Counsel of Record)
DEBORAH LYNN WOOD
GILMER, SADLER, INGRAM, SUTHERLAND & HUTTON
65 East Main Street
P. O. Box 878
Pulaski, Virginia 24301
(703) 980-1360

Counsel for Cross-Respondent, The Compass Insurance Company

MARY SUE TERRY
Attorney General of Virginia
GAIL STARLING MARSHALL
Deputy Attorney General
WILLIAM H. HAUSER
Senior Assistant Attorney General
GREGORY E. LUCYK
(Counsel of Record)
Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-2071

Counsel for Cross-Respondent, The Commonwealth of Virginia, ex rel. State Board of Elections

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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QUESTIONS PRESENTED

Whether the court of appeals correctly decided that monetary damages were not recoverable against the defendants in their official or individual capacities, because (1) the Commonwealth of Virginia had not waived its Eleventh Amendment immunity expressly or by implication, and (2) the law governing defendants' actions in March of 1983 was still evolving in all of its critical aspects, and could not be regarded as clearly established?

Whether this Court should certify to the Virginia Supreme Court the question of whether the defendants were employees of the state or the localities, where the court of appeals decision on this issue is clearly wrong, and is disrupting well settled state/local government relationships?

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Cross-Respondents, the Commonwealth of Virginia, *ex rel.* State Board of Elections, and the Compass Insurance Company, (hereafter "Commonwealth") respectfully oppose the Cross-Petition of Willie B. Kilgore, Doris McConnell and Patsy Burchett, for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, for the following reasons.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional provisions and any state statutes at issue here are reproduced in the text herein in the Cross-Petition for Writ of Certiorari, or in the Cross-Respondent Commonwealth's Petition for Certiorari docketed at 87-1424.

STATEMENT OF THE CASE

Virginia law provides that county general registrars shall be appointed by the local county electoral board to serve a four year term of office. Va. Code § 24.1-43. Virginia law also requires that the county electoral board shall consist of three members, a majority of whom "shall be from the political party which casts the highest number of votes in the Commonwealth for governor at the last preceding gubernatorial election." Va. Code § 24.1-29.

Doris McConnell and Willie Kilgore, both Republicans, were the general registrars respectively of Lee County and Scott County, in Virginia. Both were ap-

pointed in 1979 by majority Republican local electoral boards.

In January, 1982, Charles S. Robb, a Democrat, replaced Republican John S. Dalton as Governor of Virginia. With that change, the political composition of the local electoral boards changed because, as of March 1, 1983, as required by statute, the majority Republican boards were replaced by majority Democratic boards.

McConnell and Kilgore's terms were set to expire on March 31, 1983, but on March 1, 1983, the outgoing Lee and Scott County Republican boards conducted hastily convened meetings without notice to the new Democratic board members, in which they purported to reappoint McConnell and Kilgore to another four year term. Within a week, however, the newly constituted Democratic electoral boards met, and appointed Phillip Cheek and Glenda Duncan, both Democrats, as the new Lee and Scott County general registrars. All of these conflicting appointments were certified to the State Board of Elections, and the Secretary of the State Board sought state court declaratory review for a determination as to which appointees properly held office. State Circuit Judge Robert Stump ultimately held that the outgoing Republican boards were without authority to reappoint the registrars, and confirmed that Democrats Cheek and Duncan were the new duly appointed general registrars of Lee County and Scott County, Virginia.

McConnell and Kilgore then filed suits under 42 U.S.C. § 1983 in the United States District Court for the Western District of Virginia against the Commonwealth, Secretary of the State Board of Elections, and the new

Democratic members of the local electoral boards, (hereafter "defendants") claiming that the refusal to reappoint plaintiffs violated their First Amendment political speech and association rights as articulated by this Court in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 57 (1980) (hereafter "*Elrod/Branti* rule"). In addition, Patsy Burchett, a Lee County Assistant Registrar working for McConnell, was discharged by the newly appointed Cheek. She filed an identical suit against Cheek and Lee County.

Kilgore and McConnell initially applied for a preliminary injunction seeking reinstatement to their offices pending a trial on the merits. The district court denied the motion but certified the denial for an immediate interloctory appeal under 28 U.S.C. § 1292(b). In a hearing held on April 1, 1983, Circuit Judge Emory Widener, sitting as a single circuit judge, also denied the request for a preliminary injunction. Counsel for all parties *except* the Commonwealth of Virginia were present at this hearing. As Judge Widener stated in his opinion, Assistant Attorney General Karen Gould "did not appear because her aircraft could not land at the local airports. She, however, gave her position in the case to me by telephone." (C.P.A. - 10)[1] Judge Widener also noted that "each of the parties objected to all rulings I have made adverse to him . . ." (C.P.A. - 10).

On April 15, 1983, the Commonwealth filed a Motion to Dismiss the complaint on the ground, among others, that the action for damages was barred by the Eleventh

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[1]Reference is to the page number of the Appendix attached to the Cross-Petition.

Amendment to the United States Constitution. The plaintiffs thereafter voluntarily dismissed the Commonwealth as a defendant in the case, and proceeded against the named, individual defendants. From the outset, it was unclear whether the defendant local election officials were employees of the state, or of their localities, for purposes of insurance coverage and legal representation. Lee County and its insurer assumed coverage and provided legal representation from the start for the Lee County defendants, but Scott County denied coverage and refused representation. The Scott County defendants then brought a federal court declaratory judgment action against Scott County's insurer, Republic Insurance, for a ruling on whether Republic's policy provided coverage for the Scott County elections officials.

All of these cases were then assigned to District Judge Jackson Kiser, who conducted jury trials in the summer of 1985 in the McConnell, Kilgore and Burchett matters. The jury in each case was instructed to return a special verdict on the question of "whether defendants refused to reappoint plaintiff solely because of her political affiliation," and to fix damages, if any.

The jury found for the plaintiff in each case, and assessed damages at roughly $70,000 each for McConnell and Kilgore and $40,000 for Burchett. Post-trial motions were filed asserting, among other things, that political affiliation was an appropriate requirement for the position of general registrar, that the failure to reappoint plaintiffs was not equivalent to a discharge, and that the defendants were entitled to qualified immunity from personal liability for money damages. The Commonwealth

of Virginia appeared and argued as amicus on the post-trial motions. Judge Kiser rejected these motions, ordered the plaintiffs reinstated, and upheld the juries' verdicts for damages in an opinion issued in December, 1985. He reserved for further briefing, however, the question of how damages would be assessed, suggesting that the resolution of this issue was dependent upon whether the defendant board members/general registrar were state or local employees. At this time, the Commonwealth of Virginia intervened in the litigation as a party defendant, and again specifically preserved its entitlement to Eleventh Amendment immunity. The Commonwealth filed briefs and orally argued that these officials were local employees as a matter of state law, and were covered in their individual and official capacities under the localities' insurance policies. The counties of Lee and Scott appeared and contended that the defendants were state employees, while the plaintiffs argued that the defendants were in a "hybrid" category, and should be considered employees of both the state and the localities. Judge Kiser adopted the counties' arguments and in an opinion issued on April 28, 1986, declared the individual defendants to be state employees, and ordered the Commonwealth's carrier, Compass Insurance, to pay the judgments. The Commonwealth and the individual defendants timely appealed to the Fourth Circuit.

On appeal, appellants again asserted that political affiliation must be considered an appropriate requirement for the position of general registrar. In Virginia, the general registrar is the sole employee chosen by the board. Appellants argued that any political animosity or antipathy would create an untenable work situation between

the general registrar and local electoral board with the result that the interrelationship and functioning of the personnel in this small office would be strained. Appellants asserted that the Virginia legislature adopted a statutory scheme for the appointment of general registrars which permitted local boards to consider party affiliation as a criterion for the position for this reason. The appeals court rejected these contentions, finding that the state legislative appointment scheme did not mandate partisan appointments for registrars and in any event, that the possibility of political antipathy in a small office could no longer be regarded as a legitimate exception to the *Elrod/Branti* rule. The court therefore affirmed the district court's grant of injunctive relief reinstating the plaintiffs to their offices.

Appellants also argued that the district court erred in holding the defendants to be state officials, where the overwhelming weight of state statutes, administrative decisions, and state and federal judicial authority made clear that these local elections officials were considered employees of the localities in which they served. The court of appeals did not follow these state law mandates, however, and instead adopted its own, novel, "nexus to the governmental entity" formula to find that the defendants were employees of the state.

Finally, the court of appeals reversed the district court's award of damages to the plaintiffs, holding that the law relating to political discharges was not "clearly established" at the time of the employment actions in this case. Because the defendants were entitled to qualified immunity in their individual capacities, and were protected

by Eleventh Amendment immunity in their official capacities as state employees, they could not be held liable for damages.

The appellees' Petition for Rehearing In Banc, seeking reconsideration of the damages issues, was denied by a panel of the court of appeals on November 19, 1987. The Commonwealth filed its Petition for Writ of Certiorari on February 17, 1988. This cross-petition followed.

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REASONS FOR DENYING THE WRIT

A. THE ANALYSIS BY THE COURT OF APPEALS REGARDING THE STATE'S ELEVENTH AMENDMENT IMMUNITY FAITHFULLY FOLLOWS THIS COURT'S PRECEDENTS AND IS ENTIRELY CONSISTENT WITH THE DECISIONS OF OTHER COURTS OF APPEAL

The court of appeals held that the individual defendants were state officials, and concluded that monetary damages could not be recovered against them in their official capacities because of the bar of the Eleventh Amendment. This conclusion is in accord with prior decisions of this Court. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Edelman v. Jordan*, 415 U.S. 651 (1974).

The cross-petitioners argue, however, that the Eleventh Amendment should not apply here because (1) the Commonwealth has "acquiesced" in an assessment of monetary damages against state officials in this case, and (2) because the Commonwealth has "waived" its Eleventh Amendment immunity by procuring insurance coverage for its public officials who are sued in their individual ca-

pacities. Neither of these contentions merit plenary consideration by this Court.

1. The Commonwealth has not acquiesced to an assessment of monetary damages against state officials in this case.

The "acquiescence" argument is not supported by the law or the facts. Cross-petitioners assert that the Commonwealth waived its Eleventh Amendment immunity because it did not specifically object to language in the opinion and order of Judge Emory Widener, sitting as a single circuit judge, denying plaintiff's request for a preliminary injunction on the ground, among others, that lost wages would not constitute irreparable harm. This contention is ludicrous. The record establishes that the Assistant Attorney General for the Commonwealth was not even present at the hearing in which that opinion and order was issued "because her aircraft could not land at the local airports." (C.P.A.—10). Further, even if Judge Widener's order could somehow be construed as a ruling adverse to the Commonwealth's Eleventh Amendment immunity, such ruling would be deemed objected to, because, as Judge Widener stated: "Each of the parties objected to all the rulings I have made adverse to him for every reason which might be supported by the record." (C.P.A. —10).

Cross-petitioners' attempt to liken this case to the factual situations in *Toll v. Moreno,* 458 U.S. 1 (1981), and *Barnes v. Bosley,* 625 F.Supp. 81 (E.D. Mo. 1985), is without merit. In *Toll,* this Court found an affirmative representation by University counsel, which was incorporated in writing in two court orders, that tuition refunds

would be provided if the University lost on appeal. 458 U.S. at 17-18. Similarly, in *Barnes*, counsel represented in a written memorandum of law that plaintiffs could be "compensated by money damages if they were successful on a case on the merits." 625 F.Supp. at 86. There were no such affirmative representations by the Commonwealth in this case, or any representations at all for that matter that the Commonwealth would consider itself obligated to afford damages relief to the plaintiffs.

In any event, from the outset of this litigation, the Commonwealth of Virginia consistently has asserted that any recovery of monetary damages is barred against the state and her agents acting in their official capacities by the doctrine of Eleventh Amendment immunity. *See Motion to Dismiss, Kilgore/McConnell v. Fitz-Hugh, et al.*, No. 83-0090-B, ¶ 4, filed April 15, 1983; *Motion to Dismiss or for Summary Judgment, Burchett v. Cheek, et al.*, No. 85-0065-B, ¶ 7, filed April 19, 1985; Motion to Intervene as a Party Defendant, *Kilgore/McConnell Burchett, supra*, ¶ 8, filed January 6, 1986. No argument can be made that the Commonwealth has waived its Eleventh Amendment immunity by any action it has taken in this litigation. Plenary consideration of this question therefore is simply not warranted.

2. The Commonwealth did not waive its Eleventh Amendment immunity when it procured liability insurance to protect its employees sued in their individual capacities

Cross-petitioners do not contest the finding of the court of appeals that there are no Virginia statutes which

can be construed to express the clear legislative intent necessary to render the state liable in damages in federal court for the acts of its officials. They argue, instead, that the courts are in conflict whether the bar of the Eleventh Amendment applies when insurance is available to cover the loss, and assert that this Court should clarify the issue. There is no such conflict.

The federal courts which have addressed this question have uniformly concluded that the purchase by a state of insurance coverage to protect state officials who are sued in their personal capacities does not establish a waiver of Eleventh Amendment immunity. *See, e.g., Gamble v. Florida Dept. of Health and Rehab. Services,* 779 F.2d 1509, 1516-17 (11th Cir. 1986); *Thames v. Oklahoma Historical Society,* 646 F.Supp. 13, 14-15 (W.D. Okla. 1985), *aff'd,* 809 F.2d 699 (10th Cir. 1987); *Smith v. Town of Dewey Beach,* 659 F.Supp. 752, 756 (D. Del. 1987); *South Dakota Bd. of Regents v. Hoops,* 624 F.Supp. 1179, 1184 (D. S.D. 1986); *Griess v. State of Colorado,* 624 F.Supp. 450, 453 (D. Colo. 1985); *West v. Keve,* 541 F.Supp. 534, 537 (D. Del. 1982).

The cases asserted by cross-petitioners as illustrating an alleged conflict do not even relate to a state's procurement of insurance. In *Foremost Guarantee Corp. v. Community Savings & Loan, Inc.,* 826 F.2d 1383 (4th Cir. 1987), the court found that the Maryland Deposit Insurance Corporation was sued in its private capacity as the receiver of a private institution, and therefore was not an alter ego of the state. *Bennett v. White,* 671 F. Supp. 343, 349 (E.D. Pa. 1987), dealt with injunctive relief requiring the return to the plaintiffs of child support monies which had

been wrongfully confiscated by the state. And in *Brewer v. Cantrell*, 622 F.Supp. 1320 (W.D. Va. 1985), the court's observation that unemployment compensation monies constituted a "special fund" was dictum unnecessary to the court's holding that defendants were entitled to summary judgment on the merits. Clearly, there is no confusion in the law regarding the effect of a state's procurement of liability insurance which requires clarification by this Court.

Moreover, as a public policy matter, a holding that the existence of insurance coverage by a state vitiated Eleventh Amendment immunity would effectively preclude states from being able to obtain any liability coverage at all. This could have the effect of discouraging qualified individuals from seeking public service employment. Indeed, the so-called liability insurance crisis has already left many states, including Virginia, unable to obtain insurance. States have been forced to establish their own "self-insurance" programs which are funded through the public treasury.

As a practical matter, it should be noted that insurance policies have a wide variety of conditions and limitations on coverage. A holding that Eleventh Amendment immunity was abrogated to the extent of available insurance coverage would require the federal district courts in suits against a state to engage in a case by case analysis of insurance policies, coverages, limits and reserves just to determine whether jurisdiction attached in the first instance. Clearly such a result ought to be avoided.

The Commonwealth submits that there is no conflict among the circuits regarding the effect of liability insurance on a state's Eleventh Amendment immunity, and as-

serts that such an approach to federal court jurisdiction would be detrimental as a matter of public policy. For these reasons, the writ should be denied.

B. THE COURT OF APPEALS CORRECTLY FOUND THAT THE DEFENDANTS WERE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW GOVERNING THEIR ACTIONS IN MARCH OF 1983 WAS NOT CLEARLY ESTABLISHED

This Court's decisions make clear that public officials are not required to anticipate the extension of legal principles or the clarification of constitutional rights. *Mitchell v. Forsythe*, 472 U.S. 511, 534-35 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It is also especially true that the law respecting patronage personnel decisions has in the past and remains today fraught with exceptions, unsettled and controversial. The court of appeals noted in *Jones v. Dodson*, 717 F.2d 1329, 1333 (4th Cir. 1984), a political patronage case decided after the conduct at issue here, that "controlling doctrine, both substantive and procedural, is still evolving and is by no means yet authoritatively settled in all its critical aspects." *See also*, more recently, *De Abadia v. Mora*, 792 F.2d 1187, 1193 (1st Cir. 1986) ("In some cases, the application of *Elrod/Branti* may be clear; in other it will be sufficiently fraught with uncertainty that an official could not be faulted for failing to apprehend"); *Hartley v. Fine*, 780 F.2d 1383, 1388 (8th Cir. 1985) (Qualified immunity granted where there was a question whether the dismissed official was employed in a policymaking or non-policymaking position).

In this case, the court of appeals correctly found that in March of 1983, there was a significant body of case law

holding that small government offices were exempted from the *Elrod/Branti* rule. In *Ramey v. Harber,* 589 F.2d 758 (4th Cir. 1978), a case arising out of Lee County, Virginia, the home county of the defendants in this case, the court found that the factual distinctions between large and small office situations, and the greater likelihood that political animosity might thwart governmental functions in a small office, "raise[d] a question as to the applicability of *Elrod.*" 589 F.2d at 757. Judge Hall, concurring, emphasized that the small size of the office made *Elrod* inapplicable. 589 F.2d at 761. Moreover, at the time of the defendants' actions in this case, a number of other courts embraced this same small office exception to *Elrod/Branti. See McBee v. Jim Hogg County,* 703 F.2d 834, 841-42 (6th Cir. 1983); *Horton v. Taylor,* 585 F.Supp. 224, 227-28 (W.D. Ark. 1984); *Dove v. Fletcher,* 574 F. Supp. 600, 604-05 (W.D. La. 1983). In *Jones v. Dodson, supra,* the Chief Judge of the United States District Court for the Western District of Virginia relied on the small office exception in granting judgment notwithstanding the verdict in litigation involving the Page County, Virginia, sheriff's department. It was not until his decision was reversed by the court of appeals, well after the defendants' actions here, that the validity of the small office exception was called into question. *Jones v. Dodson, supra,* 727 F.2d at 1338. In light of this substantial body of law, a reasonable public official in the defendants' position could have concluded that a refusal to re-employ plaintiffs in a small government office would not have violated their constitutional rights.

It should also be noted that the defendants in this case were not experienced public officials, but included

an elementary school math teacher, a widow employed by a printing company, a Head Start Program director, and a grocer, all who had been serving only for a few days when they were required to make a decision about appointing new registrars and an assistant registrar. It cannot seriously be contended that these persons should have anticipated the future demise of the small office exception. Indeed, to hold that the law was clearly established under the factual circumstances of this case would require from these defendants a better understanding of constitutional law than that shown at that same time by the Chief Judge of the United States District Court for the Western District of Virginia. Clearly, our law governing qualified immunity would not countenance such an absurd result.

For these reasons, the court of appeals was correct in holding that the law governing defendants' conduct was not clearly established at the time of the defendants' actions in this case, and that the defendants were entitled to qualified immunity from damages liability in their individual capacities. Accordingly, there is no need for plenary consideration of this issue by this Court.

C. THE COURT OF APPEALS' HOLDING THAT LOCAL ELECTION OFFICIALS ARE STATE EMPLOYEES HAS CREATED A NOVEL AND UNSUPPORTED EXCEPTION TO STATE LAW, AND IS DISRUPTING WELL SETTLED STATE/LOCAL GOVERNMENT RELATIONSHIPS.

The Commonwealth does not dispute cross-petitioners' contention that the court of appeals incorrectly decided the question of whether the individual defendants were

employees of the state or of the localities. However, the Commonwealth has raised this issue in its own Petition for Certiorari docketed in this Court on February 17, 1988, *Commonwealth of Virginia ex rel. State Board of Elections v. Willie B. Kilgore, et al.*, No. 87-1424, and respectfully moves this Court to grant the relief requested therein.

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CONCLUSION

For the foregoing reasons, the cross-petition for writ of certiorari should be denied.

Respectfully submitted,

MARY SUE TERRY
Attorney General of Virginia

GAIL STARLING MARSHALL
Deputy Attorney General

WILLIAM H. HAUSER
Senior Assistant Attorney General

GREGORY E. LUCYK
(Counsel of Record)
Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-2071

Counsel for Cross-Respondent, the Commonwealth of Virginia, ex rel. State Board of Elections

THOMAS J. MCCARTHY
GARY C. HANCOCK
(Counsel of Record)
DEBORAH LYNN WOOD
GILMER, SADLER, INGRAM, SUTHERLAND & HUTTON
65 East Main Street
P. O. Box 878
Pulaski, Virginia 24301
(703) 980-1360

Counsel for Cross-Respondent, The Compass Insurance Company